

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

BERKSHIRE, SS.

No. SJC-12450

CITY OF PITTSFIELD,  
Plaintiff/Appellant

v.

LOCAL 447 INTERNATIONAL BROTHERHOOD  
OF POLICE OFFICERS,  
Defendant/Appellee

ON APPEAL FROM JUDGMENT OF THE  
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

BRIEF OF PLAINTIFF/APPELLANT  
CITY OF PITTSFIELD

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## TABLE OF CONTENTS

	Page
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	i
STATEMENT OF ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	8
I. This Appeal Is About Mr. Eason's Lying in a Police Report.....	8
II. The Superior Court Erred in Upholding the Award .....	12
A. DiSciullo Is Controlling.....	14
B. DiSciullo Requires a Bright Line Rule.....	18
C. This Is Not a Disparate Treatment Case.....	20
CONCLUSION.....	25
ADDENDUM A      G.L. c. 150C, § 11	
ADDENDUM B      G.L. c. 268, § 6A	
ADDENDUM C      Berkshire Superior Court's Memorandum of Decision and Order dated August 15, 2017	
ADDENDUM D      Berkshire Superior Court's Judgment Confirming Arbitration Award dated August 15, 2017	

**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

Page

**Cases**

<u>Boston v. Boston Police Patrolmen's Ass'n.</u> , 443 Mass. 813 (2005) .....	10, 11, 13, 14, 15, 16, 18, 19, 20, 23, 24, 25
<u>Boston v. Boston Police Patrolmen's Ass'n.</u> , 477 Mass. 434 (2017) .....	8, 10
<u>Bureau of Special Investigations v. Coalition of Public Safety</u> , 430 Mass. 601 (2000) .....	9
<u>City of Lynn v. Thompson</u> , 435 Mass. 54 (2001) .....	8
<u>Commonwealth v. Widrick</u> , 392 Mass. 884 (1984) .....	11
<u>Mass. Highway Dept. v. American Fed'n of State, County &amp; Mun. Employees</u> , 420 Mass. 13 (1995) .....	9, 10
<u>Matthews v. Ocean Spray Cranberries, Inc.</u> , 426 Mass. 122 (1997) .....	22
<u>Plymouth-Carver Regional School District v. J. Farmer &amp; Co.</u> , 407 Mass. 1006 (1990) .....	8
<u>Springfield v. United Public Service Employees Union</u> , 89 Mass. App. Ct. 255 (2016) .....	8

**Rules**

G.L. c. 150C, § 11 .....	1, 8
G.L. c. 268, § 6A .....	10, 17

### STATEMENT OF ISSUE

Did the Superior Court err in ruling that public policy did not require the dismissal of a police officer, and therefore err in confirming an arbitration award which imposed a lesser sanction upon that officer, under circumstances where the officer lied in a police report about his own misconduct?

### STATEMENT OF THE CASE

On May 11, 2017, the City of Pittsfield ("City") commenced the pending proceedings by filing an Application Pursuant to G.L. c. 150C, § 11 ("Application")<sup>1</sup> in the Superior Court vis-à-vis an arbitration award ("Award")<sup>2</sup> in which the arbitrator reversed the City's decision to discharge police officer Dale Eason ("Mr. Eason") for conduct unbecoming an officer, untruthfulness, and falsifying records. The arbitrator expressly found that Mr. Eason lied in a police report but instead imposed the lesser sanction of suspension on him for doing so.

On July 11, 2017, Local 447 International Brotherhood of Police Officers ("the Union") filed a

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<sup>1</sup> A4-A7.

<sup>2</sup> A9-A27.

Motion<sup>3</sup> and Supporting Memo<sup>4</sup> on Mr. Eason's behalf to Dismiss the Application and Confirm the Award, together with the City's Opposition thereto.<sup>5</sup>

On August 8, 2017, the Superior Court (Ford, J.) held a non-evidentiary hearing.<sup>6</sup>

On August 15, 2017, the Superior Court entered a Memorandum of Decision and Order ("Decision") (see Addendum C) granting the Union's Motion to Dismiss the Application.<sup>7</sup>

On August 15, 2017, the Superior Court also entered a Judgment<sup>8</sup> (see Addendum D) confirming the Award.

On August 24, 2017, the City filed a Notice of Appeal with regard to the Judgment.<sup>9</sup>

#### STATEMENT OF FACTS

The City's decision to terminate Mr. Eason for conduct unbecoming an officer, untruthfulness, and falsifying records, as well as the ensuing arbitration

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<sup>3</sup> A31-A32.

<sup>4</sup> A33-A50.

<sup>5</sup> A51-A59.

<sup>6</sup> A2 and A60-A113.

<sup>7</sup> A130-A138.

<sup>8</sup> A139.

<sup>9</sup> A140-A141.

and litigation with respect thereto, arose out of an incident (the "Incident") that occurred on February 23, 2016.

The essential facts regarding that Incident, as found by the arbitrator<sup>10</sup> and subsequently adopted by the Superior Court, were outlined by the latter as follows:

On February 23, 2016, Eason was dispatched to the Big Y Supermarket in Pittsfield in response to a complaint of shoplifting. Upon his arrival, Eason observed the suspected shoplifter, Jennifer Estes (hereafter "Estes"), in the parking lot, and he learned from store personnel that she had become irate and was screaming in the presence of other customers. Eason placed Estes under arrest for shoplifting and disturbing the peace and escorted her to the back seat of his cruiser. Once in the cruiser, she began to thrash around and to hurl insults at Eason.

Store personnel wanted to take a picture of Estes so that they could serve a no-trespass order on her and post her picture inside the store. Eason informed them that he could not bring Estes back into the store for that purpose. However, he did **forcibly** remove her from the cruiser and placed

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<sup>10</sup> A12-A15 and A24.

her on the ground . . . While Estes was on the ground, store personnel took her picture as Eason tried to hold her head still. Eason then placed her back in the cruiser and transported her to the Pittsfield police station.

Shortly thereafter, Eason wrote a police report detailing his actions in connection with this matter. He wrote that he removed Estes from the back seat of his cruiser and placed her on the ground "for her safety." **That was untrue.** He removed her for the primary purpose of allowing store personnel to take her picture, because they were unable to take her picture in the cruiser while she was continuously moving her head back and forth.

Subsequently, Estes' attorney received a video from Big Y surveillance cameras and discovered that her picture was taken while she was on the ground. He complained to the District Attorney that Eason had been untruthful when he stated in his report that Estes had been removed for her safety. The District Attorney agreed and terminated his prosecution of Estes.

An internal affairs investigation was launched, and the matter was assigned by Chief Michael Wynn (hereafter "Wynn") to Lieutenant Michael Grady (hereafter "Grady"). On May 24, 2016, Grady interviewed Eason, who agreed to answer questions with the understanding

that his answers could not be used against him in any subsequent criminal proceeding.

During his interview, Eason admitted that he removed Estes from his cruiser so that Big Y loss prevention employees could take her picture. . . . Grady reported to Wynn that Eason had admitted his report was inaccurate [and] determined that Eason had engaged in conduct unbecoming a police officer, [been] untruthful, and [falsified] a record. . . .

[Wynn] wrote a letter to the Mayor recommending that Eason be terminated. . . . [In response,] the Mayor arranged for a civil service hearing before Matthew Kerwood, who determined that Eason had falsified his report and recommended he be terminated. On September 7, 2016, Eason was discharged from his employment on grounds of conduct unbecoming a police officer, untruthfulness, and falsifying records.<sup>11</sup>

The Superior Court then went on to describe the subsequent arbitration proceedings:

The Union filed a grievance on Eason's behalf, and the matter was submitted to arbitration pursuant to the terms of a collective bargaining agreement between the City and the Union.

A hearing was held on February 14 and 15, 2017. At that hearing,

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<sup>11</sup> A130-A132 (emphasis added).



Eason testified and admitted that he had removed Estes from his cruiser so that Big Y personnel could take her picture. . . .

On April 30, 2017, the arbitrator rendered his decision. He concluded that Eason's statement in his report that he removed Estes from his cruiser "for her safety" was "**untrue, intentionally misleading** and cause for discipline, but less than intentionally false."<sup>12</sup>

At this point in its Decision, the Superior Court interjected the following observation in a footnote:

As I stated during the hearing on this matter, the distinction between "untrue and intentionally misleading" and "intentionally false" escapes me. It seems to me that if a statement is untrue and intentionally misleading, it is by definition intentionally false.<sup>13</sup>

Hence, in effect, the Superior Court ruled (quite correctly) that, despite the circumlocutious language he may have employed to do so, the arbitrator did find that Mr. Eason lied.

The Superior Court then concluded its description of the arbitration proceedings by summarizing the

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<sup>12</sup> A132-A133 (quoting from the Award at A24) (emphasis added).

<sup>13</sup> A133 at n.2.

Award entered by the arbitrator on April 30, 2017 in the following terms:

The arbitrator ultimately determined that, under all the circumstances, Eason's falsehood "was not so dishonest that it was a capital offense, and, therefore, there was no just cause to terminate [Eason] for the three misleading words in his arrest report." Accordingly, he ordered him reinstated and imposed a "three-day suspension level of progressive discipline."<sup>14</sup>

It was this Award,<sup>15</sup> of course, which in turn led to the City's filing its Application in the Superior Court,<sup>16</sup> as well as its ensuing appeal currently before this Court.

Significantly, after the entry of the Award, but before the City filed its Application, the Berkshire County District Attorney's Office issued a notice that, in the interests of justice, it would not call Mr. Eason to testify on behalf of the Commonwealth in any criminal matter.<sup>17</sup>

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<sup>14</sup> A134 (quoting from the Award at A27).

<sup>15</sup> A9-A27.

<sup>16</sup> A4-A7.

<sup>17</sup> A6 at paragraph 13 and A29.

## ARGUMENT

### I. This Appeal Is About Mr. Eason's Lying in a Police Report

The City concedes that:

- (1) "A matter submitted to arbitration is subject to a very narrow scope of review;"<sup>18</sup>
- (2) A court reviewing an arbitration award is "strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent or unsupported by the record;"<sup>19</sup> and
- (3) An arbitration award must be upheld "whether it is wise or foolish, clear or ambiguous."<sup>20</sup>

Here, the City filed its Application to vacate the Award pursuant to G.L. c. 150C, § 11, which reads in relevant part:

- (a) Upon application of a party, the superior court shall vacate an award if: ...
- (3) the arbitrators . . . rendered an award requiring a person to commit an act or engage in conduct

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<sup>18</sup> Plymouth-Carver Regional School District v. J. Farmer & Co., 407 Mass. 1006, 1007(1990).

<sup>19</sup> City of Lynn v. Thompson, 435 Mass. 54, 61 (2001).

<sup>20</sup> Springfield v. United Public Service Employees Union, 89 Mass. App. Ct. 255, 257 (2016), and "may be vacated only on statutorily enumerated grounds." Boston v. Boston Police Patrolmen's Ass'n., 477 Mass. 434, 438 (2017) (hereinafter referred to as "Williams", after the officer involved, to distinguish it from an identically named decision handed down by the Supreme Judicial Court twelve years earlier).

prohibited by state or federal  
law; . . .<sup>21</sup>

More specifically, the City's Application rests on the "public policy" exception to the general rule that ordinarily mandates arbitration awards be upheld. Under that exception, an arbitrator "may not 'award relief of a nature which offends public policy,'" and courts "are obliged to refrain from enforcing" such an award.<sup>22</sup> Whether that exception applies is ultimately a question for resolution by the courts and not by arbitrators.<sup>23</sup>

"The public policy exception does not address 'disfavored conduct, in the abstract, but [only that] which is *integral to the performance of employment duties.*'"<sup>24</sup> Yet, where (as here) an award requires an employer to reinstate an employee who has violated a public policy which "relates to a worker's employment and . . . [goes] to the heart of [his] responsibilities," that award not only may, but **must**,

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<sup>21</sup> See Addendum A.

<sup>22</sup> Mass. Highway Dept. v. American Fed'n of State, County & Mun. Employees, 420 Mass. 13, 16 (1995).

<sup>23</sup> Bureau of Special Investigations v. Coalition of Public Safety, 430 Mass. 601, 603 (2000).

<sup>24</sup> Mass. Highway Dept., 420 Mass. at 17 (emphasis in original).

be vacated.<sup>25</sup> In this case, the public policy at issue is the one requiring police officers to "be truthful in all of their official dealings."<sup>26</sup>

"It is inarguable that well defined public policy condemns police dishonesty because 'it is extremely important for the police to gain and preserve the public trust [and] maintain public confidence.'"<sup>27</sup> Indeed, G.L. c. 268, § 6A<sup>28</sup> expressly makes it a misdemeanor for a police officer to file a report knowing it is materially false. The same public policy underlying that statute mandates police departments "take all necessary actions to uphold the probity of officers under their command."<sup>29</sup>

A police officer like Mr. Eason who lies in a police report to cover up his own misconduct implicates the foregoing policy by "corrod[ing] the public's confidence in its police force."<sup>30</sup> Requiring

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<sup>25</sup> Id.

<sup>26</sup> Boston v. Boston Police Patrolmen's Ass'n., 443 Mass. 813, 821 (2005) (hereinafter "DiSciullo," after the police officer involved, to distinguish it from the Williams case cited on page 8, *supra*).

<sup>27</sup> A135. *Cf.*, DiSciullo, 443 Mass. at 819.

<sup>28</sup> See Addendum B.

<sup>29</sup> DiSciullo, 443 Mass. at 821.

<sup>30</sup> Id. at 820.

the City to reinstate Mr. Eason under these circumstances would offend public policy since his lack of credibility "could prejudice the public against an otherwise flawless criminal prosecution" stemming from any investigation in which he was involved.<sup>31</sup>

Mr. Eason's misconduct goes "to the heart of his responsibilities" as a police officer<sup>32</sup> by effectively incapacitating him from performing an essential function of his job. Not only must police officers investigate crimes, they play an integral part in the prosecution of crimes in their role as witnesses. The credibility of witnesses is a central issue in all trials and the credibility of an arresting or investigating police officer is especially important in a criminal trial. The credibility of witnesses turns on their ability and willingness to tell the truth.<sup>33</sup> A police officer with a proven record of engaging in false reporting and making intentional misstatements is prone to devastating cross-examination on the witness stand. There is no

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<sup>31</sup> Id. at 823.

<sup>32</sup> Id. at 821.

<sup>33</sup> Commonwealth v. Widrick, 392 Mass. 884, 888 (1984).

progressive discipline that can remove the tarnish to the reputation of an officer with a known propensity to distort the truth. The foregoing is precisely why the District Attorney's Office has made clear it will not call upon him as a Commonwealth witness "in any criminal matter, whether presently pending or in the future."<sup>34</sup>

Eason's reputation for untruthfulness and his lack of credibility render him unfit to serve as a Pittsfield Police Officer. As a result of his utter lack of credibility, Eason is not fit to testify in any criminal proceeding. He is patently unable to perform essential job functions and is unfit to serve as a Pittsfield Police Officer. Credibility and veracity of police officers in the performance of their duties is foundational. Absent the cornerstones of truth, credibility, and fidelity to justice, a police officer is incapable of performing their duties and is not worthy of public trust.

## **II. The Superior Court Erred in Upholding the Award**

Despite expressing sympathy for the City's argument that "police mendacity . . . strikes at the

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<sup>34</sup> See note 17, *supra*.

very heart of the criminal justice system and corrodes the public's confidence in its police force," the Superior Court nevertheless felt itself "constrained to confirm" the Award reinstating Mr. Eason.<sup>35</sup> In describing why it arrived at that conclusion, it articulated three separate reasons for doing so:

(1) It believed the DiSciullo case, in which an award reinstating a police officer who (like Mr. Eason) had lied in a police report was ultimately vacated on the basis of the public policy exception, was distinguishable from the present case.<sup>36</sup>

(2) It questioned whether DiSciullo laid down a "bright line" rule requiring termination "in all cases of dishonesty, without exception."<sup>37</sup>

(3) It suggested there was "some force to the Union's argument" that the City had treated Mr. Eason more harshly than other similarly situated officers in violation of "the principle of uniformity and equitable treatment."<sup>38</sup>

Accordingly, in the discussion which follows, the City will address these three points in turn and explain why the position the Superior Court adopted with regard to each point, and hence its resulting decision

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<sup>35</sup> A138.

<sup>36</sup> A137.

<sup>37</sup> A136.

<sup>38</sup> Id.



to confirm the Award, was erroneous as a matter of law.

**A. DiSciullo Is Controlling**

The DiSciullo case arose out of a traffic stop which "devolved into [a] mess" due to DiSciullo's "demeaning attitude" toward two passengers, whom he arrested for disorderly conduct.<sup>39</sup> "To support the arrests, DiSciullo filed an incident report and a statement of criminal charges alleging disorderly conduct, assault and battery on a police officer, and resisting arrest," which were "knowingly untrue."<sup>40</sup>

Concerned about DiSciullo's veracity, the local district attorney's office entered a *nolle prosequi* against the two passengers, and an internal affairs investigation ensued.<sup>41</sup> Following the investigation, during which he persisted in his "deliberately distorted" account of what had happened, the police department discharged DiSciullo, and he sought an arbitrator's review of that decision.<sup>42</sup>

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<sup>39</sup> See 443 Mass. at 814-815.

<sup>40</sup> Id. at 815.

<sup>41</sup> Id.

<sup>42</sup> Id. at 816.

Characterizing DiSciullo's sworn arbitration testimony as "transparently phony," the arbitrator specifically found that DiSciullo had submitted a false police report and a false statement of criminal charges.<sup>43</sup> Yet she "determined that termination was too harsh a sanction" because other police officers who had "engaged in similar or more serious misconduct" had received lesser penalties, and instead concluded that a one year suspension without pay was sufficient.<sup>44</sup> The police department appealed the award reinstating DiSciullo, first to the Superior Court (which confirmed it), then to the Appeals Court (which also did so), and finally to the Supreme Judicial Court.<sup>45</sup> The Supreme Judicial Court vacated the award on the basis that "DiSciullo's proved misconduct requires (rather than merely permits) dismissal."<sup>46</sup>

The City submits that DiSciullo is "on all fours" with the present case. Here, as in DiSciullo, the arbitrator expressly found Mr. Eason falsified a

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<sup>43</sup> Id. 816-817.

<sup>44</sup> Id. at 817.

<sup>45</sup> DiSciullo, 443 Mass. at 817.

<sup>46</sup> Id. at 822 (emphasis added).

police report that formed the basis for a criminal complaint, stating:

The grievant is a literate writer who fully described the arrest. His use of the phrase, "for her safety," was not a result of error or sloppiness. His memory was fresh.

Therefore, I believe the grievant wanted to conceal the real reason for removing the prisoner by **falsely reporting** that it was safety-related, and that the reason for this was the public disturbance that resulted when he removed, photographed and returned the prisoner to his car. . . . I believe the grievant referred to safety to deflect the readers of his report away from his bad judgment. This **intentional inaccuracy** violated the grievant's obligation to be absolutely truthful.<sup>47</sup>

As in DiSciullo, it was Eason's intentional inaccuracy which led to the district attorney's dropping of the charges against Ms. Estes, and the ensuing investigation that resulted in Mr. Eason's termination.

In its Decision, the Superior Court distinguished this case from DiSciullo on two grounds. First, it contended the *nature* of the lie in Mr. Eason's police

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<sup>47</sup> A24 (emphasis added).

report (unlike Mr. DiSciullo's) "did not go to the heart of the criminal charges" against Ms. Estes because it only concerned his own misconduct rather than hers.<sup>48</sup> Second, with regard to the *duration* of that lie, the Superior Court noted that, unlike Mr. DiSciullo, Mr. Eason "did not perpetuate his falsehood by repeating it to internal affairs investigators or by testifying falsely under oath at the arbitration hearing."<sup>49</sup> Like the arbitrator,<sup>50</sup> the Superior Court deemed these mitigating circumstances<sup>51</sup> such that Mr. Eason was "not so dishonest"<sup>52</sup> as to require mandatory dismissal.<sup>53</sup>

While the Superior Court found that Eason's misconduct was less egregious than Mr. DiSciullo's, that does not alter the fact that Mr. Eason committed a crime by making a statement in a police report that he "[knew] to be false in a material matter,"<sup>54</sup> and, by doing so, has disqualified himself from performing an

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<sup>48</sup> A137.

<sup>49</sup> A137.

<sup>50</sup> A24.

<sup>51</sup> A137.

<sup>52</sup> A25.

<sup>53</sup> A138.

<sup>54</sup> See G.L. c. 268, § 6A (Addendum B).

essential function of his job as a police officer (i.e., serving as a witness for the Commonwealth) ever again. To put it more bluntly, although Mr. Eason's lie might not have been as "bad" as Mr. DiSciullo's, his lie was still serious enough to not merely permit, but compel, the City to terminate him.

**B. DiSciullo Requires a Bright Line Rule**

In its Decision, the Superior Court depicted the City as claiming "any lie, be it big or small, absolutely disqualifies a police officer from continuing to serve in his position, and that **any** act of dishonesty, no matter the circumstances, requires dismissal."<sup>55</sup> After describing the issue in these sweeping terms, it promptly answered its own question by hypothesizing that "if an officer reported for work fifteen minutes late and told his supervisor that he was late because his child was ill, and . . . it was later discovered that he was late because he was overslept, the Court would be hard pressed to conclude that public policy **required** that he be discharged from his employment."<sup>56</sup>

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<sup>55</sup> A136.

<sup>56</sup> Id.

As a preliminary matter, the City takes issue with this parody of its position. Contrary to what the Superior Court suggests, the City does **not** claim every lie by a police officer requires his dismissal "no matter the circumstances." Instead, the standard can and should be framed much more precisely: i.e., any lie *about a material matter in a police report* mandates the officer's dismissal. Under this bright line version of the rule, Mr. Eason **must** be terminated. Hence, although a different outcome might well be justified in the hypothetical postulated by the Superior Court, that possibility is entirely inapposite to the case at bar.

The Superior Court faulted the City for failing to cite any "case in which a police officer was fired for making a single false statement in a police report."<sup>57</sup> But imposing such a requirement on the City is inherently unfair. In light of the clear alignment between this matter and DiSciullo outlined above,<sup>58</sup> it would seem more appropriate to require the Union to identify a reported decision in support of its

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<sup>57</sup> A138.

<sup>58</sup> See pages 14-17, *supra*.

position. After all, given the "explicit, well-defined and dominant" public policy enunciated in DiSciullo, calling for "police officers [to] be truthful . . . in the performance of their public duties," <sup>59</sup> the burden ought to be on the party arguing *against* the mandatory termination of an officer who lies about a material matter in a police report to proffer some authority for that position.

**C. This Is Not a Disparate Treatment Case**

The Union attempted to blunt DiSciullo's precedential force rule by portraying Mr. Eason as a victim of disparate treatment, and both the arbitrator<sup>60</sup> and Superior Court<sup>61</sup> gave this argument at least a measure of credence, by relying upon it as a justification for imposing a lesser sanction than outright termination. However, there are a several factual and legal reasons why it was improper for them to do so, and why such considerations **cannot** justify Mr. Eason's reinstatement.

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<sup>59</sup> 443 Mass. at 823.

<sup>60</sup> A15 and A26.

<sup>61</sup> A133.

The arbitrator did observe that:

The Chief testified that he has disputed internal affairs investigations that found officers' reports to have been untruthful, and, instead, concluded that the reports were inaccurately written. The Chief said the grievant's report was untruthful, not [merely] inaccurate. He acknowledged that the distinction between untruthful and inaccurate writing is subjective with an element of discretion [but] denied that his personal relationship with the grievant affected his decision in this case.<sup>62</sup>

At first glance, this observation might appear to support an inference of disparate treatment. However, any such conclusion is forestalled by the fact the arbitrator expressly found the false statement at issue in Mr. Eason's report was not due to "error or sloppiness" but was "intentionally inaccurate."<sup>63</sup> In other words, the arbitrator agreed with Chief Wynn's assessment concerning Mr. Eason's lack of veracity. As such, Mr. Eason is not entitled to the more lenient treatment that he would have received had his report

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<sup>62</sup> A15.

<sup>63</sup> A25.



merely been poorly written rather than intentionally untruthful.

It is also true the Union "presented evidence,"<sup>64</sup> and the arbitrator made a passing reference to the effect, that "other employees with similar misconduct received less harsh discipline" than Mr. Eason.<sup>65</sup> However, any such comparison between their cases is not appropriate because Mr. Eason and these other individuals were not "similarly situated," to use the rubric commonly employed in the employment discrimination context.<sup>66</sup>

While the Union contended the other employees "had done [things] much worse than what [Mr. Eason was] accused of,"<sup>67</sup> it is far from clear whether those "things" involved dishonesty as was the case with Mr. Eason. The arbitrator certainly never made an express finding that they did, but simply alluded in generic terms to the others engaging in "similar misconduct."<sup>68</sup>

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<sup>64</sup> A133.

<sup>65</sup> A26.

<sup>66</sup> Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129-130 (1997).

<sup>67</sup> A74.

<sup>68</sup> A26.

Even assuming for the sake of argument that what the other employees did was as or even more serious than what Mr. Eason did in terms of sheer egregiousness, it still does not follow the essential nature of their misconduct was the same as Eason's misconduct. As the DiSciullo decision makes abundantly clear, on-the-job dishonesty by a police officer is especially disqualifying, and requires termination, because it goes to the heart of his responsibilities as an officer and is particularly corrosive of public confidence in the police.<sup>69</sup>

Most of the Union's arguments about other employees centered around a police drug unit member who was not fired despite having purchased steroids.<sup>70</sup> That officer's misconduct is distinguishable from Mr. Eason's misconduct insofar as it occurred off-duty, did not involve dishonesty, and did not result in the dismissal of pending criminal charges.<sup>71</sup> Moreover, that officer immediately confessed his misconduct and received the strictest sanctions permitted under civil

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<sup>69</sup> See pages 9-11, *supra*.

<sup>70</sup> A74.

<sup>71</sup> A92-A93.

service precedent.<sup>72</sup> By contrast, Mr. Eason lied in a police report and did not admit to falsifying his report until questioned about it three months later, resulting in the dismissal of pending criminal charges.<sup>73</sup>

Finally, even *if* some other police officer was treated more leniently than Mr. Eason despite similar misconduct, that *still* would not justify upholding the arbitrator's Award. As the Supreme Judicial Court noted in DiSciullo:

That other police officers may have received lesser sanctions for their serious misconduct avails nothing here. Each case must be judged on its own facts, and the factual record in this cases is not before us. In any event, there is no suggestion that the reasons for [the officer's] termination were pretexts or motivated by improper considerations. Nor do we credit the association's argument that the prior dispositions worked an estoppel of the department's termination in this case. Leniency toward egregious police misconduct in the past (assuming such leniency occurred) cannot lead a police officer to commit reprehensible actions in the

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<sup>72</sup> A103-A104.

<sup>73</sup> A93-A94 and A131-A132.

expectation that he will receive a light punishment.<sup>74</sup>

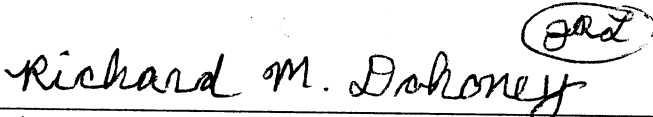
CONCLUSION

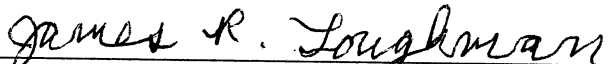
In light of the foregoing, the City respectfully requests that this Court vacate the Judgment entered by the Superior Court, and either enter judgment for the City with respect to its decision to terminate Mr. Eason, or remand this case to the Superior Court with appropriate instructions.

Dated: December 4, 2017

THE PLAINTIFF/APPELLANT  
CITY OF PITTSFIELD

By its attorneys,

  
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Email: mail@docatty.com

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<sup>74</sup> See 443 Mass. at 822 n. 9.

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2017, I have caused the foregoing document to be served on the parties to this matter by mailing a true copy, postage prepaid, to Timothy M. Burke, Esq., Law Offices of Timothy M. Burke, 160 Gould Street, Needham, MA 02494.

James R. Loughman

CERTIFICATION UNDER MASSACHUSETTS RULES  
OF APPELLATE PROCEDURE 16(k)

I hereby certify that the foregoing brief complies with the Massachusetts Rules of Court that pertain to the filing of appellate briefs, including, but not limited to: Mass. R.A.P. 16(a)(6), Mass. R.A.P. 16(e), Mass. R.A.P. 16(f), Mass. R.A.P. 16(h), Mass. R.A.P. 18, and Mass. R.A.P. 20.

James R. Laughman

JRL:djb

# **ADDENDUM A**

## **ALM GL ch. 150C, § 11**

Current through Act 95 of the 2017 Legislative Session.

**Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT  
[Chapters 1 - 182] > TITLE XXI LABOR AND INDUSTRIES [Chapters 149 - 154] > Chapter 150C  
Collective Bargaining Agreements to Arbitrate**

### **§ 11. Arbitrators — Awards — Judicial Vacations.**

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- (a) Upon application of a party, the superior court shall vacate an award if:—
  - (1) the award was procured by corruption, fraud or other undue means;
  - (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
  - (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law;
  - (4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party;
  - (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.
- (b) An application under this section shall be made within thirty days after delivery of a copy of the award to the applicant, provided that, if such application is based upon a claim of corruption, fraud or other undue means it shall be made within thirty days after such grounds are known or should have been known.
- (c) In vacating the award on grounds other than stated in clause (5) of paragraph (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with section three, or if the award is vacated on grounds set forth in clause (3) or (4) of paragraph (a), the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section three. The time within which the agreement requires the award to be made shall be applicable to the rehearing and shall commence from the date of the order.
- (d) If the application to vacate an award is denied and no motion to modify or correct the award is pending, the court shall confirm the award.



# **ADDENDUM B**

**ALM GL ch. 268, § 6A**

Current through Act 95 of the 2017 Legislative Session.

***Annotated Laws of Massachusetts > PART IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES [Chapters 263 - 280] > TITLE I CRIMES AND PUNISHMENTS [Chapters 263 - 274] > Chapter 268 Crimes Against Public Justice***

**§ 6A. False Reports — By Public Officers or Employees — Penalty.**

Whoever, being an officer or employee of the commonwealth or of any political subdivision thereof or of any authority created by the general court, in the course of his official duties executes, files or publishes any false written report, minutes or statement, knowing the same to be false in a material matter, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.

# **ADDENDUM C**

**COMMONWEALTH OF MASSACHUSETTS**

**BERKSHIRE, ss.**

**SUPERIOR COURT  
CIVIL ACTION NO. 17-126**

**CITY OF PITTSFIELD**

**v.**

**LOCAL 447 INTERNATIONAL BROTHERHOOD  
OF POLICE OFFICERS**

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S  
MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND TO CONFIRM  
ARBITRATION AWARD, AND PLAINTIFF'S CROSS MOTION TO  
VACATE ARBITRATION AWARD**

This is an action brought by the City of Pittsfield (hereafter the "City") to vacate an arbitration award and to issue an order upholding the termination of Officer Dale Eason (hereafter "Eason"), pursuant to G. L. c. 150C, § 11. The defendant, Local 447 International Brotherhood of Police Officers (hereafter the "Union"), has filed a motion to dismiss the City's application and to confirm the award of the arbitrator. The City, in its memorandum of law, asks the Court to vacate the award, and to uphold Eason's termination of employment as a police officer. On August 7, 2017, I conducted a non-evidentiary hearing on this matter.

The facts are largely uncontested. On February 23, 2016, Eason was dispatched to the Big Y Supermarket in Pittsfield in response to a complaint of shoplifting. Upon his arrival, Eason observed the suspected shoplifter, Jennifer Estes (hereafter "Estes"), in the parking lot, and he learned from store personnel that she had become irate and was screaming in the presence of other customers. Eason placed Estes under arrest for shoplifting and disturbing the peace and escorted her to the back seat of his cruiser. Once in the cruiser, she began to thrash around and to

hurl insults at Eason.

Store personnel wanted to take a picture of Estes so that they could serve a no-trespass order on her and post her picture inside the store. Eason informed them that he could not bring Estes back into the store for that purpose. However, he did forcibly remove her from the cruiser and placed her on the ground, at which point she began to struggle and to scream obscenities and racial epithets at Eason, who is African American. Other African Americans in the vicinity heard the racial slurs, and store personnel apologized to them. While Estes was on the ground, store personnel took her picture as Eason tried to hold her head still. Eason then placed her back in the cruiser and transported her to the Pittsfield police station. She continued to be abusive and combative.

Shortly thereafter, Eason wrote a police report detailing his actions in connection with this matter. He wrote that he removed Estes from the back seat of his cruiser and placed her on the ground "for her safety." That was untrue. He removed her for the primary purpose of allowing store personnel to take her picture, because they were unable to take her picture in the cruiser while she was continuously moving her head back and forth. Subsequently, Estes's attorney received a video from Big Y surveillance cameras and discovered that her picture was taken while she was on the ground. He complained to the District Attorney that Eason had been untruthful when he stated in his report that Estes had been removed for her safety. The District Attorney agreed and terminated his prosecution of Estes.

An internal affairs investigation was launched, and the matter was assigned by Chief Michael Wynn (hereafter "Wynn") to Lieutenant Michael Grady (hereafter "Grady"). On May 24, 2016, Grady interviewed Eason, who agreed to answer questions with the understanding that his

answers could not be used against him in any subsequent criminal proceeding. During his interview, Eason admitted that he removed Estes from his cruiser so that Big Y loss prevention employees could take her picture. Grady pointed out to him that Estes should not have been forcibly removed from the cruiser for the purpose of allowing store personnel to take her picture, because "it looks awful in the Big Y parking lot" where there are "customers coming and going." Eason responded, "I know this now." Grady reported to Wynn that Eason admitted that his report was inaccurate. He determined that Eason had engaged in conduct unbecoming a police officer, that he had been untruthful, and that he had falsified a record. However, Eason was not charged with using excessive force.

Grady reported his conclusions to Wynn, who wrote a letter to the Mayor recommending that Eason be terminated. In that letter, Wynn referred to an incident that took place in June of 2015, in which Eason and another officer were mistakenly dispatched to an incorrect address and wound up arresting an elderly woman under very controversial circumstances. That matter was investigated by the Internal Affairs Unit, and Eason was exonerated. However, Wynn's letter stated that Eason remained under investigation for his role in that incident.<sup>1</sup> In response to Wynn's letter, the Mayor arranged for a civil service hearing before Matthew Kerwood, who determined that Eason had falsified his report and recommended that he be terminated. On September 7, 2016, Eason was discharged from his employment on grounds of conduct unbecoming a police officer, untruthfulness, and falsifying records.

The Union filed a grievance on Eason's behalf, and the matter was submitted to arbitration

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<sup>1</sup> At the hearing on this matter, the City's attorney was unable to tell me if that matter is *still* under investigation, more than two years after the fact.

pursuant to the terms of a collective bargaining agreement between the City and the Union. A hearing was held on February 14 and 15, 2017. At that hearing, Eason testified and admitted that he had removed Estes from his cruiser so that Big Y personnel could take her picture. He also acknowledged that, in doing so, he made a mistake. The Union presented evidence that, in the past, Wynn exercised his discretion by reducing charges of untruthfulness and imposing discipline short of termination. One of those cases involved a member of the drug task force who was charged with illegally possessing steroids and who was suspended for five days. The Union also offered evidence that, as a result of the 2015 incident, the City was sued and the case was settled. Finally, there was evidence that in the aftermath of the 2015 incident, a Pittsfield police captain was quoted in the local newspaper as saying that Eason was "toxic." Eason asked Wynn to investigate the captain's decision to make that comment, but no investigation ever took place. Wynn did acknowledge, however, that the captain's comment was "unprofessional." The City pointed out during the hearing that Eason had a history of prior discipline, including a 2011 charge of conduct unbecoming a police officer for which he received a three-day suspension. The other charges resulted either in verbal reprimands or a condition that he attend counseling.

On April 30, 2017, the arbitrator rendered his decision. He concluded that Eason's statement in his report that he removed Estes from his cruiser "for her safety" was "untrue, intentionally misleading and cause for discipline, but less than intentionally false."<sup>2</sup> He went on to find that Eason readily admitted to Grady that his real purpose was to allow Big Y personnel to take Estes's picture, and that he acknowledged his error during his testimony at the arbitration

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<sup>2</sup> As I stated during the hearing on this matter, the distinction between "untrue and intentionally misleading" and "intentionally false" escapes me. It seems to me that if a statement is untrue and intentionally misleading, it is by definition intentionally false.

hearing. The arbitrator also found that other officers who had engaged in similar misconduct were not terminated but were instead disciplined, and that Wynn's decision to recommend termination may have been influenced by hard feelings stemming from the 2015 incident and the resultant lawsuit against the City. The arbitrator ultimately determined that, under all the circumstances, Eason's falsehood "was not so dishonest that it was a capital offense, and, therefore, there was no just cause to terminate [Eason] for the three misleading words in his arrest report." Accordingly, he ordered him reinstated and imposed a "three-day suspension level of progressive discipline." The City now seeks to vacate that arbitration award, and the Union seeks to confirm it.

"A matter submitted to arbitration is subject to a very narrow scope of review." Plymouth-Carver Regional School District v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990). Especially where the parties have elected to arbitrate disputes as part of a collective bargaining agreement, the Court defers to that election and is "strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record." Lynn v. Thompson, 435 Mass. 54, 61 (2001). An arbitration award must be upheld "whether it is wise or foolish, clear or ambiguous." Springfield v. United Public Service Employees Union, 89 Mass. App. Ct. 255, 257 (2016), quoting Boston v. Boston Police Patrolmen's Association, 443 Mass. 813, 818 (2005). "In arbitrations pursuant to collective bargaining agreements, awards may be vacated only on statutorily enumerated grounds. G. L. c. 150C, § 11 (a) (3) ('superior court shall vacate an award if . . . the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law.')" Boston v. Boston Police Patrolmen's Association, 477 Mass. 434, 438 (2017). If an arbitration award



violates public policy, the Court is “obliged to refrain from enforcing it.” Massachusetts Highway Department v. American Federation of State, County & Municipal Employees, Council 93, 420 Mass. 13, 16 (1995). “However, because the public policy doctrine allows courts to bypass the normal heavy deference accorded to arbitration awards and potentially to ‘judicialize’ the arbitration process, the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy.” Plymouth Public Schools v. Education Association of Plymouth & Carver, 89 Mass. App. Ct. 643, 650 (2016).

In determining whether this narrow public policy exception requires the vacation of an arbitrator’s award, the Court applies a stringent, three-part analysis. “First, the policy at issue ‘must be well defined and dominant, and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests’. . . . Second, the exception does not address ‘disfavored conduct in the abstract, but only disfavored conduct which is integral to the performance of employment duties’. . . . Finally, we require a showing that the arbitrator’s award reinstating the employee violates public policy to such an extent that the employee’s conduct would have required dismissal.” Boston v. Boston Police Patrolmen’s Association, 477 Mass. at 442. “The question in the third prong is not whether the employee’s behavior violates public policy, but whether an award reinstating him or her does so.” Id. at 442-443, citing Eastern Associated Coal Corp. v. United Mine Workers, 531 U. S. 57, 62-63 (2000).

The first two prongs of the test are easily met in this case. It is inarguable that well defined public policy condemns police dishonesty because “it is extremely important for the police to gain and preserve the public trust [and] maintain public confidence . . . .” Clancy v. McCabe, 441 Mass. 311, 328 (2004). Moreover, it is a misdemeanor for an officer to file a report, knowing

that it is false in a material matter. See G. L. c. 268, § 6A. In addition, there is no question that the filing of true and accurate reports is integral to the performance of a police officer's duties. Thus, only the exception's third prong remains in dispute.

The City argues that public policy not only permits but requires Eason's termination. It claims that any lie, be it big or small, absolutely disqualifies a police officer from continuing to serve in his position, and that *any* act of dishonesty, no matter the circumstances, requires dismissal. However, such a "bright line" rule has evidently not been consistently applied by the City, because, as the arbitrator pointed out, the drug task force member who illegally possessed steroids received only a five-day suspension and is still a member of the department. There appears to be some force to the Union's argument that this disparity violates "the principle of uniformity and equitable treatment of similarly situated individuals." Falmouth v. Civil Service Commission, 447 Mass. 814, 824 (2006). Beyond that, if an officer reported for work fifteen minutes late and told his supervisor that he was late because his child was ill, and if it was later discovered that he was late because he overslept, the Court would be hard pressed to conclude that public policy *required* that he be discharged from his employment. Even (and perhaps especially) in matters of public policy, there is room for nuance, judgment and discretion. I am not convinced by the City's argument that termination is required in all cases of dishonesty, without exception. Given the other facts found by the arbitrator (i.e., that Wynn's decision to recommend termination may have been influenced by the 2015 incident in which Eason was exonerated, that other officers received less severe punishment for similar misconduct, etc.), "it was within the arbitrator's ample authority to conclude that these factors made progressive discipline rather than termination an appropriate remedy." City of Springfield v. United Public

Service Employees Union, 89 Mass. App. Ct. at 260.

In pressing for Eason's termination, the City relies upon Boston v. Boston Police Patrolmen's Association, 443 Mass. 813 (2005). However, the facts of that case do not compare favorably with those of the instant case. In the Boston case, a police officer falsely arrested two individuals and filed a false incident report and a false statement of criminal charges. When his misconduct was discovered, he lied to an internal affairs investigator. He then testified at an arbitration hearing, and the arbitrator found his testimony to be "deliberately distorted" and "transparently phony." Id. at 816. The Supreme Judicial Court held that "[g]iven the arbitrator's findings that [the officer] had falsely arrested two individuals on misdemeanor and felony charges, lied in sworn testimony and over a period of two years about his official conduct, and knowingly and intentionally squandered the resources of the criminal justice system on false pretexts, an agreement to reinstate [the officer] would offend public policy." Id. at 819.

No such aggravating circumstances are present in the instant case. Eason did not falsely arrest Estes for shoplifting, and his inaccurate statement in his report about his reason for removing her from his cruiser did not go to the heart of the criminal charges against her. Unlike the officer in the Boston case, Eason did not perpetuate his falsehood by repeating it to internal affairs investigators or by testifying falsely under oath at the arbitration hearing. He did not "shroud his own misconduct in an extended web of lies and perjured testimony." Id. at 820. Instead, he admitted that his report was inaccurate and acknowledged his mistake. The Boston case is readily distinguishable, and I do not believe that it supports the City's position in this case. The City has not established to my satisfaction that public policy *requires* that Eason's conduct, as determined by the arbitrator in light of all the relevant circumstances, must be

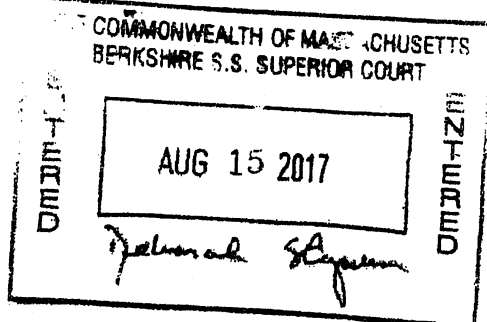
deemed grounds for mandatory dismissal, and that any lesser sanction would frustrate public policy. Indeed, the City has not brought to my attention one case in which a police officer was fired for making a single false statement in a police report.

I would simply add that if I had been the arbitrator, I might have imposed a more severe sanction. I take a very dim view of police mendacity, and I am sympathetic to the City's argument that such dishonesty strikes at the very heart of the criminal justice system and corrodes the public's confidence in its police force. I must also commend the District Attorney for his ethical and highly principled decision not to call Eason as a witness in the future or to prosecute any of his cases unless there is independent evidence to corroborate his testimony. Such action will hopefully serve to reassure the public that no one will be convicted solely on the word of an officer with this type of blemish on his record. However, in light of the heavy deference and narrow scope of review which must be given to an arbitration award and the requirement that courts use considerable caution in overturning an award on public policy grounds, I feel constrained by the law to confirm the award of the arbitrator in this case.

**ORDER**

For the foregoing reasons, the City's application to vacate the arbitration award is **DENIED**. The motion of the defendant, Local 447, to dismiss the City's application and to confirm the arbitration award is **ALLOWED**. Accordingly, **JUDGMENT** shall enter for the defendant.

Dated: August 15, 2017



*Daniel A. Ford*

Daniel A. Ford  
Justice of the Superior Court

# **ADDENDUM D**

**JUDGMENT CONFIRMING ARBITRATION AWARD****Trial Court of Massachusetts  
The Superior Court**

DOCKET NUMBER

**1776CV00126**

Deborah S. Capeless, Clerk of Courts

CASE NAME

City of Pittsfield  
vs.  
Local 447 International Brotherhood Of Police Officers

COURT NAME &amp; ADDRESS

Berkshire County Superior Court  
76 East Street  
Pittsfield, MA 01201

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)

Local 447 International Brotherhood Of Police Officers

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)

City of Pittsfield

This action came on before the Court, Hon. Daniel Ford, presiding, and the court having ordered that arbitration award be confirmed, and upon consideration thereof,

It is **ORDERED AND ADJUDGED**:

Judgment is hereby entered for the defendant confirming arbitration award dated April 30, 2017.

FORM OF JUDGMENT APPROVED:

ASSOCIATE JUSTICE OF THE SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS  
BERKSHIRE S.S. SUPERIOR COURT

AUG 15 2017

DATE JUDGMENT ENTERED  
08/15/2017

CLERK OF COURTS/ ASST. CLERK

X

Asst Clerk